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No. 79-1252

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, *et al.*,
Petitioners,

vs.

SIERRA CLUB, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Petitioners State of California, et al.

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QUESTIONS PRESENTED

This case raises the following questions:

(1) Does the Rivers and Harbors Act of 1899, which prohibits obstructions to navigable capacity subject to approval of the Army Corps of Engineers, apply to state water allocations adopted under the water rights laws of the western states, even where the allocations have no substantial effect on actual navigation?

(2) Does the Rivers and Harbors Act of 1899, which applies to diversion works built by a "person" or "corporation," apply to diversion works owned and operated by a state?

(3) Does the Rivers and Harbors Act of 1899 apply to federal reclamation projects built and operated under the Reclamation Act of 1902?

(4) Does the Army Corps of Engineers have authority, under the Rivers and Harbors Act of 1899, to prohibit structures and activities that do not affect the navigable capacity of the nation's navigable waterways?

PARTIES

The respondents, plaintiffs below, are the Sierra Club, a non-profit California corporation; Friends of the Earth, a non-profit New York corporation; Hank Schramm, a commercial fisherman; and William Dixon, a landowner. See Pet. App. 3 n. 1.

The State petitioners, defendants below, are the State of California; Huey D. Johnson, present Secretary of Resources of the State of California; and Ronald B. Robie, present Director of the State Department of Water Resources. See Pet. App. 4 n. 3.

The federal defendants, who have not filed a petition for writ of certiorari, are Cecil Andrus, present Secretary of the Interior; R. Keith Higginson, present Commissioner of the U. S. Water and Power Resources Service, formerly the U. S. Bureau of Reclamation; Clifford L. Alexander, present Secretary of the Army; Lt. Gen. Joseph K. Bratton, present Chief of Engineers, U. S. Army Corps of Engineers; Col. Paul F. Kavanaugh, present District Engineer of the U. S. Army Corps of Engineers, Sacramento District; and Col. Paul Bazilwich, Jr., present District Engineer of the Army Corps of Engineers, San Francisco district. See Pet. App. 4 n. 2.

The intervenors are the Kern County Water Agency; the Metropolitan Water District of Southern California; the Tulare Lake Basin Water Storage District; and the Santa Clara Valley Water District. See Pet. App. 4 n. 3.

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Brief for Petitioners State of California, et al.

OPINIONS BELOW

The decision of the U. S. Court of Appeals is officially reported at 610 F.2d 581 (9th Cir. 1979), and is reprinted as an appendix to our petition for writ of certiorari. See Pet. App. 2-65.[1] The decision of the district court is officially reported at 400 F.Supp. 610 (N.D. Cal. 1975), and is reprinted as a supplemental appendix to our petition for writ of certiorari. See Pet. Supp. App. 1-69.

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1. "Pet. App." and "Pet. Supp. App." are references to the appendix and supplemental appendix, respectively, attached to the petition for writ of certiorari filed by the State of California *et al.* in No. 79-1252.

JURISDICTION

The decision of the U. S. Court of Appeals was rendered on October 31, 1979. A petition for rehearing was filed by the plaintiffs on November 21, 1979, and was denied on January 17, 1980. Our petition for writ of certiorari was filed on February 13, 1980, and was granted on October 6, 1980. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL LAWS INVOLVED

This case involves an interpretation of sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403. Section 10 provides:

> *"Obstruction of navigable waters generally; wharves; piers; etc.; excavations and filling in.*
>
> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to the beginning of the same." 33 U.S.C. § 403.

Section 9 provides:

> *"Construction of bridges, causeways, dams or dikes generally.*
>
> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in

any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army." 33 U.S.C. § 401.

STATEMENT OF THE CASE

1. Facts of the Case.

In 1960, the California electorate approved an initiative that authorized funding for the State Water Project (SWP), a massive reclamation project that delivers water from rural mountainous areas in northern California to metropolitan and agricultural areas in central and southern California. See Cal. Water Code §§ 12930-12942. This project is owned by the State, and operated by the State Department of Water Resources (SDWR). The SDWR has entered into 31 water supply contracts with irrigation and municipal water districts in central and southern California. The contracts provide for ultimate delivery of approximately 4.2 million acre-feet of water annually from the SWP. Many contracting water districts have entered into other contracts with local agricultural, industrial and domestic users, and have built water distribution works, on the assumption that SWP water would be available

for local needs. The SWP has been in operation since the late 1960's. Pet. App. 7-9; Pet. Supp. App. 4-5, 8-9.[2]

The main component of the SWP is a large dam and reservoir near Oroville on the Feather River, a tributary of the Sacramento River. The dam releases water that eventually reaches the Sacramento-San Joaquin Delta, a maze of interlocking channels which form the confluence of the Sacramento and San Joaquin Rivers. The Delta drains into San Francisco Bay, which in turn drains into the Pacific Ocean. SWP water is exported from the Delta by a State pumping facility located at the south end of the Delta. The exported water flows through a State aqueduct to the contracting water districts in central and southern California. The Sacramento and San Joaquin Rivers, and the Delta which forms their confluence, arise and flow solely in California. Pet. App. 7-8; Pet. Supp. App. 8-9.

Pursuant to the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. §§ 371 *et seq.*, the federal government built its own reclamation project in California, known as the Central Valley Project (CVP). The CVP, which is the largest reclamation project in the nation, was initially authorized by the Rivers and Harbors Act of 1935, 49 Stat. 1028, and the Rivers and Harbors Act of 1937, 50 Stat. 844, 850. The CVP includes several dams and reservoirs on the upper Sacramento and San Joaquin Rivers. The dams release water that flows downstream to the Delta, where CVP water is commingled with SWP water. The CVP is operated by the U.S. Water and Power Resources Service

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2. The SWP presently provides a water supply for approximately 14 million people and serves approximately 500,000 acres of prime agricultural land. See Decision 1485, at p. 2, State Water Resources Cont. Bd. (Aug. 1978), cited at n. 3, *infra.*

A more complete description of the SWP is found at pages 22-28 of SDWR's Bulletin 76 (July 1978), a certified copy of which has been lodged with the Clerk of this Court. The Court can take judicial notice of this document as an official governmental publication. See, *e.g., City of Beatrice v. Edminson,* 117 Fed. 427 (8th Cir. 1902); *Rockville & W. Turnpike Rd. v. Andrews,* 20 F. Cas. 1079 (C.C. Ind. 1844).

(WPRS), formerly the U.S. Bureau of Reclamation. The WPRS has also signed water delivery contracts with many agricultural and municipal water districts in central California. CVP waters are exported from the Delta by a federal pumping facility located at the south end of the Delta, and flow through a federal aqueduct to the contracting water districts in central California. Pet. App. 6-7; Pet. Supp. App. 3-4, 8. See generally *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 727-735 (1950); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-284 (1958).

A major problem of California's water supply system is that the Delta's waters are perennially threatened by the intrusion of ocean salt waters. The intruding salt waters pose a threat to valuable economic and environmental interests in the Delta; the Delta sustains a rich agricultural economy, and is the source of unusual species of fish and waterfowl. The intruding salt waters also threaten to degrade the quality of SWP and CVP waters exported from the Delta to the contracting water districts in central and southern California. An effective way to prevent such salinity intrusion is to flush out the salt waters by release of vast quantities of fresh waters from the upstream dams and reservoirs of the SWP and CVP. The more water that is used for flushing purposes, however, the less water is available for export to the contracting water districts. A conflict thus exists between Delta water needs and the water needs of users in central and southern California. The allocation of water between these needs requires a careful balancing of many statewide interests, and will thus have a major impact upon California's economic growth and environmental quality. See n. 3, *infra;* Note, "Delta Water Rights Decision," 2 *Ecol. L. Quar.* 733 (1973).

Under California law, the authority to allocate water among competing needs rests with the State Water Resources Control Board ("State Board"). The State Board has authority to grant appropriative water rights to the extent that such rights are con-

sistent with the "reasonable and beneficial use" of water and in the "public interest." Cal. Const., Art. X, § 2; Cal. Water Code §§ 275, 1201, 1225, 1250-1258, 1375-1415. The SDWR and WPRS have applied to the State Board for permits to appropriate water for use in the SWP and CVP, respectively. After lengthy hearings, the State Board granted appropriative permits subject to conditions that the projects release water from upstream storage or discontinue water exports from the Delta to the extent necessary to meet Delta water quality standards set by the State Board. The State Board has periodically modified its Delta water quality standards on the basis of new information concerning economic, domestic and environmental needs of both Delta and non-Delta interests. The State Board recently issued a landmark administrative decision, Decision 1485, which generally provides that, as a condition of SWP and CVP water exports from the Delta, (1) Delta consumptive uses must receive at least the same water quality which would have been received if the SWP and CVP had not been built, and (2) Delta environmental interests, such as fish and wildlife, must receive a high level of water quality that will ultimately achieve historical levels of protection. Under this decision, the SWP and CVP can export waters from the Delta to the extent these conditions are met. The decision, by defining the conditions for water exports from the Delta, effectively results in an allocation of water among economic, domestic and environmental interests in northern, central and southern California.[3]

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3. The contents of the last two paragraphs are based on findings in Decision 1485, and also on the findings in the water quality control plan and environmental impact report that were issued in conjunction with Decision 1485. See Decision 1485, at pp. 1-19, State Water Resources Cont. Bd. (Aug. 1978); Water Quality Control Plan, at pp. I-1 through I-10, State Water Resources Cont. Bd. (Aug. 1978); Environmental Impact Report, at I-1 through I-10, III-3 through III-30, State Water Resources Cont. Bd. (Aug. 1978). These documents were issued after the

The plaintiff in this case, the Sierra Club, participated in the hearings before the State Board that led to the issuance of Decision 1485, but did not file a lawsuit challenging the State Board's allocation of water under Decision 1485. Therefore, to the extent that the plaintiffs seek to protect Delta environmental interests in the allocation of water between Delta and non-Delta interests, they have a remedy under State law which they have failed to pursue.

To improve the quality of waters exported from the Delta, the State has proposed for several years to build a 42-mile canal around the eastern margin of the Delta that will carry fresh water from the Sacramento River to the SWP and CVP pumping plants in the south Delta. Pet. App. 8; Pet. Supp. App. 10. The canal, known as the Peripheral Canal, would release fresh water into the Delta at selected intervals. *Id.* After years of statewide political controversy surrounding the canal, the California Legislature recently enacted legislation authorizing construction of the canal. See 1980 Cal. Stats., ch. 632.

2. Legal Issues Raised.

Prior to issuance of Decision 1485 and legislative authorization of the Peripheral Canal, the plaintiffs initiated this action against the federal officials who operate the CVP, the State officials who operate the SWP, and the State of California. Various water districts which have contracted for the delivery of SWP water intervened on the side of the defendants.

In the case below, the plaintiffs alleged that (1) sections 9

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conclusion of the trial below, and thus are not part of the official record. The Court, however, can take judicial notice of these documents as official governmental publications. See n. 2, *supra.*

We are lodging copies of these three documents with the Clerk of this Court concurrently with the filing of our brief. We will supply additional copies to the Court upon request.

Several lawsuits have been filed against the State Board by Delta and non-Delta interests, including the United States on behalf of the WPRS, each claiming that Decision 1485 allocates insufficient water to each's own needs. These cases are now pending in the California courts. See *Delta Water Cases,* Judicial Council Coordination Proceeding No. 548, Superior Ct., City and County of San Francisco.

and 10 of the Rivers and Harbors Act of 1899 require that the Army Corps of Engineers ("Corps") issue a permit as a prerequisite to SWP and CVP water exports from the Delta to the contracting water districts, and as a prerequisite to construction of the Peripheral Canal, and (2) the Corps cannot issue such a permit until it has prepared and issued an environmental impact statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347. Pet. App. 5-6.

The defendants alleged that (1) the Rivers and Harbors Act of 1899 does not authorize a private right of action, (2) the plaintiffs lack standing to maintain their action,[4] (3) sections 9 and 10 of the 1899 Act are not applicable to SWP and CVP water exports from the Delta or to construction of the Peripheral Canal, and (4) the requirements of the sections have been met if they are applicable here. In addition, the federal defendants alleged that section 10 is not applicable to CVP water diversions because the diversion works have been expressly authorized by Congress.

3. The Case Below.

The district court rejected the defendants' main arguments, ruling that (1) the Rivers and Harbors Act of 1899 provides for a private right of action, (2) the plaintiffs have standing to maintain their action, (3) sections 9 and 10 of the 1899 Act are applicable to SWP and CVP water exports from the Delta and to construction of the Peripheral Canal, and (4) the requirements of the sections have not been met here. Pet. Supp. App. 1-69.

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4. The State defendants raise no issue at this time concerning the plaintiffs' standing, or whether the 1899 Act authorizes a private right of action. These issues, however, have been raised in the petition for writ of certiorari filed by the intervenors, which has been granted by the Court. See *Kern County Water Agency et al. v. Sierra Club et al.*, No. 79-1502. In our view, the Court should reach the merits of the action regardless of its disposition of these procedural issues because, even if the plaintiffs are procedurally disqualified from maintaining their action, the United States would still be free to assert the rights of the Corps as upheld by the lower court.

The district court, in holding that sections 9 and 10 are applicable here, ruled that SWP and CVP water exports affect "navigable capacity" within the meaning of section 10, because the exports reduce Delta water levels and cause reversal of flows in the Delta. Pet. Supp. App. 29-30. According to its findings, the exports from the SWP pumping plants reduce water levels by approximately 6/10 feet in the vicinity of the plants, but the combined exports from *both* the SWP and CVP plants reduce water levels by less than 1/10 feet, *i.e.* about an inch, in the area of the Delta where commerce is actually carried out.[5] We concede that the exports affect "navigable capacity" in the sense that they reduce Delta water levels, but argue that, since the levels are reduced by only an inch in the area where commerce is actually carried out, the exports do not have any substantial effect on actual navigation or otherwise render the waters unusable for commerce. The district court made no findings on this question.

The Court of Appeals essentially affirmed the decision of the district court. Pet. App. 3-60. The appellate court ruled, however, that section 10 is not applicable to CVP water diversions from the Delta because the diversions have been specifically authorized by Congress. Pet. App. 41-53.

The Court of Appeals, affirming the district court, enjoined the State defendants from exporting water from the Delta or

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5. Specifically, the State pumping plant diverts water from a 2-mile inlet channel which is connected to Italian Slough, which in turn is connected to Clifton Court Forebay. Pet. Supp. App. 8-9. The forebay is connected to a canal that leads to Old River, a tributary of the San Joaquin River. *Id.* The district court found that, although there is "some question as to the accuracy" of the figures, *id.* at 30, the State pumping plant apparently reduces water levels in Italian Slough by approximately 6/10 feet in the vicinity of the plant, and the combined operation of the State and federal plants reduces water levels in the vicinity of Clifton Court Forebay by approximately 1-1½ feet, *id.* at 29. The district court also found, however, that the combined operations of both plants reduce water levels by less than 1/10 feet in the San Joaquin River, where commerce is actually carried out. *Id.;* Pet. App. 8 n. 5. The tide alone causes Delta water levels to vary by 3-3½ feet per day. J.A. 121a (R. 423).

commencing construction of the Peripheral Canal prior to obtaining a permit from the Corps. Pet. App. 58-59. The appellate court stayed the injunction with respect to water exports until the Corps issues a permit, but did not stay the injunction with respect to construction of the Peripheral Canal. Pet. App. 58-59.[6]

SUMMARY OF ARGUMENT

I

The Rivers and Harbors Act of 1899 prohibits any "obstruction" to "navigable capacity" of the nation's navigable waterways in the absence of congressional approval. The Act provides, however, that the Army Corps of Engineers ("Corps") has authority to approve certain such obstructions. The primary question in this case is whether the Act applies to water allocations authorized under the water rights laws of the western states.

The purpose of the 1899 Act was to fill a federal regulatory void caused by the absence of any federal common law relating to navigation obstructions. With respect to water allocations authorized under state water rights laws, however, there is no federal regulatory void. Instead, Congress has enacted several laws, primarily in the areas of mining, desert lands and reclamation, that delegate broad authority to the western states to allocate their sparse water supply among competing regional and local needs. These congressional laws establish an historic policy, often upheld by this Court, of deferring to state water rights laws. This historic policy is undermined if the 1899 Act is construed as authorizing the Corps to veto State water allocations.

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6. The appellate court remanded the case to the district court for determination of whether the State pumping plant is exempt from the permit requirements of the 1899 Act because of a "grandfather clause" provision in the Corps' regulations. Pet. App. 56-57. The case would not be moot even if the district court finds that the State pumping plant is thus exempt from the Act. First, the exemption, if it exists, would apply only to existing pumps, not to pumps which have not yet been built. The State plans to build additional pumps that will enlarge the plant's capacity by 60% in 1980. Pet. App. 8. Second, the exemption would not apply to the Peripheral Canal, which has not yet been built.

In our view, the 1899 Act should be accommodated and harmonized with the historic congressional policy of deferring to state water rights laws. Under our view, the 1899 Act should be construed as either (1) not applicable to water allocations adopted under state water rights laws, subject to Congress' power to override such allocations if they impair federal navigation interests, or (2) applicable to state water allocations only to the extent that such allocations substantially interfere with actual navigation or otherwise render the waters unusable for commerce. This result, we believe, results in an accommodation of Congress' disparate laws and policies on the related subjects of navigation and reclamation.

Our suggested alternative approaches are supported by the historic role played by the western states and the Corps over control of the West's sparse water resources. The states, acting pursuant to the congressional delegation of authority, have traditionally allocated water under their water rights laws, and have thus reclaimed much of their arid lands and achieved a large measure of economic growth and prosperity. The Corps, acting under the 1899 Act, has not traditionally controlled water allocations in the West. Under the Court of Appeals' decision, however, the Corps would have virtually plenary authority to override state water allocations, and thus determine the priority of water among competing economic and environmental needs.

II

The Rivers and Harbors Act of 1899 provides for penal sanctions and injunctive relief only against a "person" or "corporation," and thus apparently applies only to a "person" or "corporation." There is no indication in the Act or its legislative history that these terms were meant to include the sovereign states. Therefore, the Act does not apply to diversion works owned and operated by the states.

III

The Rivers and Harbors Act of 1899 does not apply to reclamation works built and operated by the federal government under the Reclamation Act of 1902. The latter Act provides that such works are to be operated by the U. S. Water and Power Resources Service (WPRS), and that state law controls federal water uses under the Act except to the extent that such state laws are inconsistent with "clear congressional directives." See *California v. United States*, 438 U.S. 645 (1978). Thus, the 1902 Act authorizes the WPRS to operate the works subject to state laws that are not in conflict with specific federal laws. There is no indication, either in the 1902 Act or its legislative history, that Congress meant for the Corps to control the allocation of water from these works under the 1899 Act.

IV

The Court of Appeals ruled that the Rivers and Harbors Act of 1899 applies to structures and activities that have no effect on navigable capacity. This ruling is dictum, for—although we maintain that the diversion works in this case do not substantially interfere with federal navigation interests—we concede that the works affect, however insubstantially, navigable capacity.

The court's dictum is erroneous. The 1899 Act prohibits obstructions to navigable capacity in the absence of congressional approval, except to the extent that certain such obstructions are approved by the Corps. The purpose of this statutory scheme is to provide a method to obtain administrative approval of certain such obstructions without seeking redress from Congress. Therefore, the Corps has power only to authorize that which is otherwise prohibited by the Act, and has no jurisdiction over obstructions that do not affect navigable capacity.

ARGUMENT

INTRODUCTION

The fundamental question in this case is whether the Army Corps of Engineers ("Corps") has authority, under the Rivers and Harbors Act of 1899, to control water allocations authorized under the water rights laws of the western states, particularly where the allocations have no substantial effect on actual navigation. For many decades, it has been assumed that the Corps' authority under the Act is limited to structures or activities unrelated to state water allocations. The Act has been applied, for example, to bridges, piers and other structures that impede navigation, and to sewage discharges that cause water pollution. In none of these cases has the Act been applied to restrain state water allocations, particularly where, as here, the allocations have no measurable impact on actual navigation.

As this Court has held on several occasions, Congress has delegated broad authority to the western states to control water allocations under their water rights laws. Acting under this delegated authority, the western states have reclaimed much of their arid lands, and thus achieved a large measure of economic growth and prosperity. In this case, for example, California has undertaken a massive effort to redistribute its limited water supply in order to serve many important public needs. Congress' historic tradition of deferring to state water rights laws is undermined by the lower decision, which holds that the Corps has virtually plenary authority to override state water allocations.

Certainly Congress has constitutional authority to override state water allocations where federal navigation interests are affected. Congress has exercised this power sparingly, however, in keeping with its tradition of deferring to state water rights laws. Nothing in the 1899 Act indicates that Congress meant to depart from this tradition in enacting the Act.

In our view, this Court should accommodate federal navigation interests with state reclamation interests in construing the 1899

Act, rather than wholly ignore either interest. In this brief, we suggest two alternative approaches which would achieve such an accommodation. Preferably, the Court should hold that the 1899 Act is not applicable to water allocations adopted under state water rights laws, but that Congress has authority to override such allocations to protect federal navigation interests. Alternatively, the Court should hold that the 1899 Act restrains state water allocations only to the extent that such allocations interfere with important federal navigation interests, in the sense that they substantially interfere with actual navigation or otherwise render the waters unusable for commerce. These suggested arguments, we believe, result in a proper balancing of federal and state interests with respect to control of water resources in the West, and thus reaffirm the historic federalism which Congress has steadfastly pursued on this subject.

I. IN LIGHT OF THE HISTORIC CONGRESSIONAL POLICY OF DEFERRING TO STATE WATER RIGHTS LAWS GOVERNING WATER ALLOCATIONS IN THE WESTERN STATES, SECTIONS 9 AND 10 OF THE RIVERS AND HARBORS ACT OF 1899 SHOULD BE CONSTRUED AS NOT AFFECTING SUCH ALLOCATIONS, OR ALTERNATIVELY AS AFFECTING SUCH ALLOCATIONS ONLY TO THE EXTENT THAT THEY SUBSTANTIALLY INTERFERE WITH FEDERAL NAVIGATION INTERESTS.

A. SECTIONS 9 AND 10 OF THE RIVERS AND HARBORS ACT OF 1899.

The first clause of section 10 of the Rivers and Harbors Act of 1899 prohibits any "obstruction" to "navigable capacity" of the nation's navigable waterways in the absence of congressional approval. 33 U.S.C. § 403; see p. 2, *supra*. The second and third clauses of section 10, as well as section 9, provide methods for legitimizing certain such obstructions without congressional approval. Specifically, section 9 legitimizes certain structures, such as bridges and dams, if approved by the Corps and the legislature of the affected state. 33 U.S.C. § 401; see pp. 2-3, *supra*. The second clause of section 10 legitimizes certain other structures,

such as wharves and piers, if approved simply by the Corps. 33 U.S.C. § 403; see p. 2, *supra*. The third clause of section 10 legitimizes certain *activities* that may "alter or modify" the "condition" or "capacity" of navigable waters, such as excavations and fills, if such are approved by the Corps. 33 U.S.C. § 403; see p. 2, *supra*. In short, the first clause of section 10 imposes a general prohibition against obstructions to navigable capacity without congressional approval, and the other provisions qualify the broad reach of the prohibition by authorizing certain such obstructions without Congress' consent.[7]

Section 10, in prohibiting obstructions to "navigable capacity," has a very broad reach. As the district court properly held, an obstruction to "navigable capacity" includes any structure that affects *hypothetical* navigation, regardless of whether it affects *actual* navigation. Pet. Supp. App. 25-27. The section thus requires examination of the kinds of commerce that might be carried on at a future time, not just the kinds of commerce that are carried on at the present. *Id.*; see *United States v. Republic Steel Corp.*, 362 U.S. 482, 487 (1960). The section applies to obstructions that affect both potential and actual commerce.

The primary question here is whether section 10 applies to water diversions authorized under the water rights laws of the western states. Such diversions typically have an effect on "navigable capacity," in the sense that the diversions at least affect *hypothetical* navigation. That is, most diversions from a navigable

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7. The Court of Appeals held, however, that the second and third clauses of section 10, as well as section 9, are not *qualifications* of the general prohibition against navigation obstructions contained in the first clause of section 10, but instead impose *prohibitions* that are in addition to the general prohibition. Pet. App. 24-27. As we explain more fully below, the lower court's analysis is dictum, because we concede that the diversions in this case have an effect, however minor, on navigable capacity. See pp. 52-58, *infra*. Because of the broad implications of the dictum upon western water law, however, we analyze the dictum below for the purpose of showing that it is contrary to the meaning of sections 9 and 10. We have deferred our discussion of this dictum because it is peripheral to our main argument that sections 9 and 10, however construed, are not applicable to water allocations authorized under state water rights laws.

stream diminish, however slightly, the flow of water in the stream. The diminution of the flow affects, however slightly, hypothetical if not actual navigation. In this case, for example, water diversions by the SWP and CVP have no impact on *actual* navigation, because they lower Delta water levels by about an inch in locations where commerce is actually carried forth. See n. 5, *supra*. The lowered water levels, however, may have *some* impact, however nominal, on *hypothetical* navigation. Therefore, if section 10 is construed as applicable to water diversions authorized under state water rights laws, the section would prohibit, subject to Corps approval, most water diversions authorized under such state laws. The Corps would thus exercise veto power over most water allocations authorized under the laws of the western states.

The historical circumstances that led to the enactment of the 1899 Act indicate that Congress did not contemplate that the Act would apply to water allocations authorized under state water rights laws. The Act originated in the Rivers and Harbors Act of 1890, 26 Stat. 454. As this Court has noted, the 1899 Act simply rearranged the provisions of the 1890 Act, and did not substantively alter their meaning. See *Wisconsin v. Illinois,* 278 U.S. 367, 412 (1929); *United States v. Republic Steel Corp.*, 362 U.S. 482, 486 (1960). The 1890 Act, as this Court has noted, was intended to overcome the effect of this Court's decision in *Williamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888). See *Wisconsin v. Illinois, supra* at 412; *United States v. Republic Steel Corp., supra* at 486. In the *Williamette Bridge* case, an action was brought to restrain the private construction of a bridge over navigable waters in Oregon, on grounds that the bridge constituted an obstruction to navigation. This Court, in rejecting the action, ruled that "there is no common law of the United States which prohibits obstructions and nuisances in navigable waters . . . ." 125 U.S. at 8. Although Congress has undoubted authority to prohibit such obstructions, no federal common law bars such obstructions until

Congress acts. *Id.* at 10-11. See also *Gilman v. Philadelphia,* 70 U.S. (3 Wall.) 713, 724 (1886); *Cardwell v. American Bridge Co.,* 113 U.S. 205, 208-209 (1885); *Hamilton v. Vicksburg, Shreveport & Pac. R.R.,* 119 U.S. 280 (1886).[8]

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8. The *Williamette Bridge* decision concluded, however, that federal common law precludes a state from placing obstacles in navigable, interstate waters that impair the rights of other states in such waters, 125 U.S. at 15-17. Accord, *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 54 U.S. (13 How.) 518 (1852). This Court has developed federal common law rules governing disputes where one state diverts interstate waters to the detriment of other states, under which the waters must be "equitably apportioned" between the states. See, *e.g., Nebraska v. Wyoming,* 325 U.S. 589, 618 (1945); *New Jersey v. New York,* 283 U.S. 336, 342-343 (1931). This Court has also developed a "federal common law nuisance" doctrine governing disputes where one state pollutes interstate waters to the detriment of other states. See *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972).

On its face, the *Williamette Bridge* decision, in holding that the federal common law does not bar obstructions in navigable waters where the rights of other states are unaffected, appears to be obliquely inconsistent with other decisions of this Court respecting federal power under the Commerce Clause. This Court has held that, at least where navigable waters are not involved, the federal government has inherent power to prevent obstructions to interstate commerce even in the face of congressional silence. See *In re Debs,* 158 U.S. 564 (1895); *United States v. San Jacinto Tin Co.,* 125 U.S. 273, 279-280, 284 (1888). Further, there is no question that an action can be maintained under the Commerce Clause to restrain a state from imposing an unreasonable burden on interstate commerce, even where Congress has not authorized such an action. See, *e.g., Covington & Cincinnati Bridge Co. v. Kentucky,* 154 U.S. 204 (1894); *Hall v. DeCuir,* 95 U.S. 485 (1978). Indeed, it appears that, under the English common law, the sovereign has an inherent right to prevent obstructions and nuisances in navigable waters that prevent the free flow of commerce. See Note, "Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case," 59 *Colum. L. Rev.* 1065, 1074-1076 (1959); Wisdom, "Obstructions in Rivers," 119 *Just. P.* 846 (1955).

It is submitted, however, that the *Williamette Bridge* decision can be reconciled with this Court's other decisions respecting inherent federal powers under the Commerce Clause. In *Williamette Bridge,* the Court appeared to suggest that the states have broader control over their navigable waters than over other avenues of commerce. That is, Congress gave the states broad control of their navigable waters under the "equal footing" doctrine, see *e.g., Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), and this control includes the right to create obstacles to commerce unless Congress affirmatively revokes the power. Congress did not, however, grant the states the same control over other avenues of commerce, and thus the federal government has inherent power to prevent obstructions of these other avenues.

The 1899 Act thus originated in the 1890 Act, the purpose of which was to overcome the absence of a federal common law applicable to obstructions in navigable waters. The 1890 and 1899 Acts, by prohibiting such obstructions except where approved by the Corps, filled the void created by the absence of any federal regulatory laws on the subject. With respect to water allocations authorized under state water rights laws, however, there is no federal regulatory void. Instead, as we shall see in the next part of this brief, Congress has legislated extensively in this area. Under its legislative scheme, Congress has delegated broad authority to the western states to control such allocations under their water rights laws. Nothing in the 1890 or 1899 Acts indicates that Congress meant to withdraw or limit its delegation of authority to the states to control water allocations. Since the purpose of the 1890 and 1899 Acts was to fill a void created by congressional inattention, and since no such void exists with respect to state control of water allocations, it is clear that the 1890 and 1899 Acts were not intended to limit such state control.

This conclusion is supported by the legislative history of the 1890 and 1899 Acts. In the congressional debates relating to the 1890 Act, on which the 1899 Act was based, the only example of the kind of structure regulated by the Act that was cited during the debates was the construction of a "bridge" by a "railroad company" or other "corporation" over navigable water.[9] A bridge

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9. For example, Senator Vest stated on several occasions that the Act would apply to "railroads" which built "bridges" over navigable waters. 21 Cong. Rec. 8603-8604, 8606 (1890). He also mentioned on several occasions that the Act would apply to "bridges" built by "corporations." *Id.* at 8603-8604, 8690. Senator Gray stated the Act would prevent a state from authorizing construction of a "bridge" over navigable waters, even though the bridge might be part of a road system authorized by the state. *Id.* at 8604. Senator Dolph stated that, under the Act, "whenever a State authorizes a *bridge* over a navigable stream the plan shall be submitted to the Secretary of War and approved by him before the bridge shall be built;" it is "wise," he stated, "to require that all *bridges* authorized under State laws shall also be approved by the Secretary of War," and that "where the States authorize the construction of *bridges,*

—which is the same kind of structure involved in the *Willamette Bridge* case—is not the kind of structure that is related to water allocations authorized under state water rights laws. Further, no mention was made during the debates of the various federal laws which, as we shall see in the next part of this brief, delegate authority to the western states to control the allocation of their waters. This congressional silence is significant because many of these federal laws had been enacted shortly before the passage of the 1890 and 1899 Acts. It is thus evident that Congress, in enacting the 1890 and 1899 Acts, had in mind the kinds of obstacles, such as bridges, that had never received congressional attention. It did not have in mind the state water allocation systems that Congress had recognized and upheld on several prior occasions.

B. CONGRESSIONAL DELEGATION OF AUTHORITY TO THE STATES TO CONTROL WATER ALLOCATIONS.

We now examine the congressional laws that authorize the western states to control water allocations under their water rights laws. As we shall see, Congress delegated broad authority to the states in this area, so that the states could reclaim the "howling wilderness" depicted earlier by Daniel Webster. See 1 Kinney, *Irrigation and Water Rights* 8 (2d ed. 1912). Congress thus

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. . . the plans should be approved by the Secretary of War as plans are required to be approved of *bridges* authorized by Congress." *Id.* at 8605. (Emphasis added.) Senator Carlisle stated that the Act establishes the "policy . . . of authorizing the Secretary of War through the Corps of Engineers to superintend the construction of *bridges* across navigable streams," and further "proposes to authorize the Secretary of War to cause the removal or alteration of *bridges* heretofore unlawfully constructed under statutes passed by the State legislatures, which they had a right to pass." *Id.* at 8990. (Emphasis added.)

Significantly, the above statements indicate that the congressional focus was not only limited to bridges and other such structures, but was also limited to structures that were built by private entities rather than states. This conclusion appears from other parts of the congressional debates. For instance, Senator Hoar stated that the Act would apply to a "corporation," *id.* at 8606, Senator Edmunds stated that the Act would apply to a "railroad company," *id.* at 8607, and Senator Gray also stated that the Act would apply to "railroad companies," *id.* at 8606.

expressed its will on the effect of state water rights laws by a series of enactments passed shortly before the 1899 Act. If, in enacting the 1899 Act, Congress had meant to radically depart from a course chartered shortly before, it would have spoken with reasonable clarity. The absence of such clarity in the 1899 Act is a clear indication that no such departure was intended.

1. Development of State Water Rights Laws.

Before turning to the congressional laws that delegate authority to the western states to control the allocation of water resources, it is necessary to first understand the historical forces that led to the enactment of these laws. Because of the unique circumstances of the West, where water is in short supply, a unique doctrine of water rights law has been developed to provide for maximum utilization of the West's water resources. In the early West, water rights law was based on the riparian doctrine, a common law doctrine which is traceable to the Institutes of the Roman Emperor Justinian. Under this doctrine, a landowner has the right to use water on lands that are appurtenant to the waterway. The discovery of gold in California in 1848, however, produced a migratory surge that placed increasing demands on the West's limited water resources. In response to these demands, a new doctrine of water law emerged as a custom among the early miners and farmers, and was soon recognized by the early courts and legislatures. Under this new doctrine, known as the doctrine of prior appropriation, a water user has the right to "appropriate," or divert and use, water that is not appurtenant to his lands, as long as he puts the water to reasonable and beneficial use. The state has authority to determine whether he is putting water to reasonable and beneficial use, and can limit his right to the extent that he fails to do so. See generally *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-750 (1950); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 153-157 (1935); *Jennison v. Kirk*, 98 U.S. 453, 456-459 (1878).

With the growth and development of the West, the western states developed administrative and judicial systems as a means to determine whether a proposed water use results in reasonable and beneficial use, and thus whether the water user should have the right to divert and use the water. See, *e.g.*, I Hutchins, *Water Rights Laws in the Nineteen Western States* 302 (1971).[10] Under the administrative systems, a water user who seeks to appropriate water must apply for, and obtain, an appropriative permit from the state in which the water is located. *Id.* The state issues the permit only if the applicant shows that he will put water to reasonable and beneficial use, and can impose conditions to the extent necessary to ensure that water is put to such use. *Id.* These administrative water rights systems are the functional basis of modern western water law. California adopted such an administrative system in 1914. See Cal. Water Code §§ 1000-5975.

The western states, in granting water rights under their administrative and judicial systems, effectively allocate water among competing regional and local needs. These allocations provide water for drinking and sanitation purposes for people who reside in communities located far from the water source. They provide irrigation water to farms that grow foods for sale and consumption in local, national, and international markets. They provide cooling water for industrial plants that manufacture foods or goods. They provide the power behind hydroelectric dams that generate electricity for homes and industries. They provide a habitat for fish and wildlife. These various needs are served by the SWP and CVP water exports in this case. See pp. 3-5, *supra.* The exports are part of a monumental effort to obtain the widest possible benefit from the State's limited water supply.

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10. Of the eighteen western continental states, all but two require an appropriator of surface water to obtain an appropriative permit from the state. *Id.* The exceptions are Colorado and Montana. *Ibid.* Colorado provides a system of statutory adjudication for the acquisition of appropriative rights, rather than an administrative system. *Ibid.* Montana provides for the acquisition of appropriative rights by either statutory adjudication or by posting of notice and filing of records. *Ibid.*

The allocation of water under state water rights laws is thus the key to the West's economic growth and environmental quality. Unlike other regions in the nation, the arid West lacks sufficient water to make its lands habitable and productive unless water is diverted from its natural channel to other areas where it is needed for human consumption. As the California Supreme Court has stated:

> "The conservation of other natural resources is of importance, but the conservation of the waters of the State is of transcendent importance. Its waters are the very life blood of its existence." *Chow v. City of Santa Barbara,* 217 Cal. 673, 702 (1933).

The allocation of water under state water rights laws thus results in the maximum utilization of the West's limited water supply. It has played a major role in converting the great western desert into a modern situs of bustling cities and thriving farms.

2. The "Severance" and "Equal Footing" Doctrines.

Having examined the historical forces that led to the adoption of the water rights laws of the western states, we now turn to the congressional laws that recognize and uphold such state laws. In the late nineteenth century, doubts were raised concerning the validity of the appropriation doctrine adopted by the western states, as applied to waters traversing the public domain lands owned by the federal government. To resolve these doubts, Congress enacted several laws that effectively "sever" the waters from the public domain lands, and provide that state water rights laws control the appropriation of water in the West, whether or not the water traverses the public domain lands.

The Mining Act of 1866, 14 Stat. 251, 253, as amended, 16 Stat. 217, 218 (1870), which authorized miners to occupy and use the public domain lands for mining purposes, provided that the right to use water on the lands was subject to "local customs, laws and the decisions of the courts." 14 Stat. at 253. This Act

constituted the first congressional recognition of the appropriation doctrine which had become the basis of western water law. This Court, commenting on the Act's effect, noted that the appropriation doctrine developed by the western states was an "absolute necessity" in view of the sparseness of the West's water supply. *Broder v. Water Co.*, 101 U.S. 274, 276 (1879). See *California v. United States*, 438 U.S. 645, 656 (1978); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 705 (1899); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 153-157 (1935); *Ickes v. Fox*, 300 U.S. 82, 95 (1937).

A few years later, Congress, seeking to encourage settlement of the western lands, enacted the Desert Land Act of 1877, 19 Stat. 377. This Act granted lands to those who settled on the arid western lands. It further provided that the settlers' rights to water "shall depend on bona fide prior appropriation," and that unappropriated, non-navigable waters not acquired by the settlers were "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes." 19 Stat. 377. In *California Oregon Power Co. v. Beaver Portland Cement Co., supra*, this Court held that the 1877 Act, in conjunction with the earlier mining acts, effected a "severance of all waters upon the public domain, not theretofore appropriated, from the land itself." 295 U.S. at 153-157. Under this severance, the western states have broad control of their unappropriated waters, whether or not the waters flow across federally-owned lands. As a result of the severance, the states have the right to adopt the riparian or appropriation doctrine, or a combination of the two; the federal government cannot force any rule upon the state. *Id.* at 163-164. See *California v. United States, supra* at 657-658; *Ickes v. Fox, supra* at 95.

Independently of the "severance" doctrine, the states also have broad authority to control their navigable waters under the "equal footing" doctrine. When the original thirteen states formed a new Union to replace the outworn confederacy, they retained con-

trol of their navigable waters, including the fisheries therein and the underlying beds. See, *e.g., Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 224-229 (1845); *Shively v. Bowlby,* 142 U.S. 1, 49-50 (1894); *United States v. Oregon,* 295 U.S. 1, 14 (1935); *United States v. Texas,* 339 U.S. 716-717 (1950). When new states joined the Union, they were admitted on an "equal footing" with the original thirteen states, and thus also acquired control of their navigable waters. *Id.* Therefore, the western states enjoy the same control of their navigable waters that is enjoyed by the original thirteen states. The "equal footing" doctrine thus provides another basis, in addition to the "severance" doctrine, for state control of water.

As this Court has often noted, the states' control of their unappropriated waters under the "severance" and "equal footing" doctrines is subject to paramount federal powers under the navigation servitude and the reserved rights doctrine. See *California Oregon Power Co. v. Beaver Portland Cement Co., supra* at 159; *California v. United States, supra* at 662; *United States v. Rio Grande Dam & Irrig. Co., supra* at 703.[11] Under the navigation

11. The Desert Land Act of 1877, by its terms, applies to waters that are "not navigable." 19 Stat. 377. The Mining Act of 1866, however, contains no such limitation. See 14 Stat. 251, 253 (1866), as amended, 16 Stat. 217, 218 (1870). The *Beaver* Court appeared to suggest that these acts, in conjunction, provide for state control of all unappropriated waters, whether or not the waters are navigable; it stated that the severance of water from public domain lands applies to "all waters upon the public domain, not theretofore appropriated. . . ." 295 U.S. at 158.

The question whether the Desert Land Act of 1877 and related acts are confined to nonnavigable waters is now largely moot. Subsequent congressional statutes, particularly in the reclamation area, provide for broad state control of water regardless of the navigability of the water. See, *e.g.,* Reclamation Act of 1902, § 8, 43 U.S.C. §§ 372, 383; Federal Water Supply Act of 1958, 43 U.S.C. § 390(b). Moreover, as noted above, this Court has held on several occasions that the "equal footing" doctrine provides a basis for state control of navigable waters. See, *e.g., Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 224-229 (1845). These various doctrines and developments make clear that state water laws extend to *all* waters, whether navigable or not, to the extent not inconsistent with the navigation servitude and the reserved rights doctrine. Accord, *California v. United States, supra* at 662.

servitude, the federal government has power to protect the navigability of the nation's waterways, to ensure that such waters can continue to serve as the great highways of commerce. See *e.g.*, *California Oregon Power Co. v. Beaver Portland Cement Co.*, *supra* at 159-162; *California v. United States*, *supra* at 662.[12] Under the reserved rights doctrine, the federal government has power to use waters, navigable or otherwise, to the extent necessary to serve the needs of federal lands withdrawn from the public domain. See, *e.g.*, *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128, 138-42 (1976); *Arizona v. California*, 373 U.S. 546, 595-601 (1963). As this Court recently noted in *California v. United States*, *supra*:

> "[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters." 438 U.S. at 662.

We do not, of course, argue that Congress lacks power under the navigation servitude or reserved rights doctrine to override state water rights laws. Instead, we argue that Congress, under the "severance" and "equal footing" doctrines, has established a clear policy of deferring to state water rights laws where important federal interests are not at stake. This policy results in an historic accommodation of federal and state interests with respect to control of water resources in the West. It should not be presumed

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12. In *Kaiser Aetna v. United States*, 100 S.Ct. 383 (1979), this Court recently reaffirmed the distinction between the navigation servitude and Congress' regulatory power over commerce. As the Court noted, the navigation servitude involves the limited power to protect navigation. 100 S.Ct. at 389-392. Congress' regulatory power over commerce, however, is much broader; it applies whether or not navigation, or even water, is involved. *Id.* Since the Court has traditionally held that state control of navigable waters is limited only by the navigation servitude and the reserved rights doctrine, it has made clear that such state control is not limited by Congress' regulatory power over commerce. This is apparently the reasoning behind the Court's widely-quoted comment in *Kansas v. Colorado*, 206 U.S. 46, 92 (1907), that federal laws cannot "override state laws in respect to the general subject of reclamation." See *California v. United States*, *supra* at 663.

that Congress means to depart from this policy unless it speaks with reasonable clarity, or unless important federal interests are at stake. No such clarity is found in the Rivers and Harbors Act of 1899, for the Act provides no indication that Congress meant to restrain the western states' right to control the allocation of their waters. Moreover, important federal interests are not at stake in this case, for the water diversions by the SWP and CVP do not substantially affect actual commerce dependent on the Delta's waters. Therefore, it is unlikely that Congress meant for the 1899 Act to apply to the water diversions in this case.

3. Federal Reclamation Laws.

Congress, beyond establishing a general policy of deferring to state water rights laws, has specifically applied this policy in the context of land reclamation. It has thus upheld the right of the western states to allocate their waters as a means for achieving economic growth and prosperity. This conclusion is significant here because the primary purpose of water exports from the Delta by the CVP and SWP is to reclaim the semiarid lands of California, and thus utilize California's limited water supply for varied public purposes. Hence, Congress has deferred to state water rights laws in the very context presented in this case.

Congress initially addressed the subject of reclamation in the late nineteenth century. In 1891, Congress provided for the acquisition of rights-of-way across public lands by "any canal or ditch company formed for the purpose of irrigation." Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. § 946.[13] This Act

13. Congress had earlier adopted laws, such as the Homestead Act of 1862, 12 Stat. 392, to encourage settlement of the West's unpopulated lands. To avoid the possibility that settlers would acquire sites that are suitable for reclamation, Congress provided in 1888 that lands selected or designated as reservoir sites by the federal government would be reserved from settlement. Act of October 2, 1888, 25 Stat. 527. The Act was repealed, however, when it became clear that the Act reserved all western public lands from settlement. Act of August 30, 1890, 26 Stat. 391. Congress passed the 1891 Act to fill the void created by its repeal of the 1888 Act. See *California v. United States*, 438 U.S. 645, 661 (1978).

specifically provided, however, that "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." 26 Stat. 1101. Congress amended the Act in 1897 to make clear that the Act does not preclude construction of reclamation works on sites surveyed by the federal government. Act of Feb. 26, 1897, 29 Stat. 599. The 1897 amendment expressly authorized the states to control the management and pricing of water developed by reclamation works built under authority of the Act. *Id.* The 1890 Act and its 1897 amendment thus provided that reclamation shall be carried forth in conformity with state laws. See *California v. United States,* 438 U.S. 645, 659-662 (1978).

This Court recently noted that "it was clearly the opinion of a majority of the Congressmen who spoke on the bill [which became the 1897 amendment] . . . that such an amendment was unnecessary except out of an excess of caution." *California v. United States, supra* at 661. According to Congressman Lacey, Chairman of the House Committee on Public Lands and a principal sponsor of the bill:

> "The water [through which the reclamation would be accomplished] does not belong to the [Federal] Government. The reservoirs in which the water is stored belong to the Government, but the water belongs to the States and will be controlled by them. The amendment proposed by the gentleman from Illinois [Mr. Cannon] relieves this measure from all possible doubt upon that subject. I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the States and Territories to regulate and control the man-

agement and the price of the water." 20 Cong. Rec. 1952 (1897). See *California v. United States, supra* at 662[14]

Thus, the 1891 Act and its 1897 amendment made clear that state law controls the reclamation of land in the West, at least to the extent that reclamation is undertaken by private enterprise. Significantly, the 1891 and 1897 Acts were adopted *after* the Rivers and Harbors Act of 1890 which, as noted earlier, was the forerunner of the Rivers and Harbors Act of 1899. If Congress had intended that the 1890 Act would limit state control of reclamation under the 1891 and 1897 Acts, Congress would surely have so indicated. To the contrary, the legislative history of the 1891 and 1897 Acts makes clear that the states were to have exclusive control of the reclamation process.

A few years later, Congress embarked on its own program to reclaim the arid lands of the West. It enacted the Reclamation

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14. The Court in the *California* case cited the following statements made during the congressional debates:

> " 'A reservoir site without water is entirely useless. The water is the particular thing in question, and the waters are controlled by the States through which they flow, and not by the United States of America. These are surface waters, the waters of small streams not navigable, and the States control them.
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> * * * * *
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> " '[T]he United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the States.' 29 Cong. Rec. 1948-1949 (1897) (Cong. Lacey). 'It is the State alone that owns and controls the water, under the constitution of our States; and I suppose that is true under the laws of every State.' *Id.* at 1951. (Cong. Bell). 'The amendment which has been proposed by the gentleman from Illinois [Mr. Cannon], and adopted, really serves no purpose, because it merely reenacts the existing law. It would be the law even if the act of 1891 were not in existence. The waters belong to the States. The United States Government has always recognized that, and the States have enacted legislation directly controlling the use of the waters.' Id., at 1952 (Cong. Shafroth). Only Congressman Terry, who unsuccessfully opposed the bill, suggested the contrary. In his view, the Federal Government could use its control of the land to regulate the price of the water stored. See *id.*, at 1949-1950." 438 U.S. at 661 n. 16.

Act of 1902, 32 Stat. 388 (1902), as amended, 43 U.S.C. §§ 371 *et seq.*, which provides for federal construction and operation of reclamation dams and other works in the West. Importantly, Congress continued and extended the principle of state control of water under the Act. Section 8 thereof provides that the Act shall not be construed as interfering with state laws respecting the "control, appropriation, use, or distribution" of water, and that the Secretary of the Interior, who is to operate the facilities built under the Act, must "proceed in conformity with" such state laws. 32 Stat. 390, 43 U.S.C. §§ 372, 383. In *California v. United States, supra,* this Court held that section 8 authorizes the states to control both the appropriation and distribution of water developed by the federal government under the Act, except where state laws are inconsistent with "clear congressional directives." 438 U.S. at 665-668. It is anomalous that, although this Court now recognizes the states as having broad control of water developed by *federal* projects, the Court of Appeals' decision recognizes the federal government—through the Corps—as having broad control of water developed by *state* projects.

Even though the Reclamation Act of 1902 was passed shortly after the Rivers and Harbors Act of 1899, nothing in the 1902 Act indicates that state control of water thereunder is subject to Corps approval. Nor is such an indication found in the congressional debates relating to the 1902 Act. During these debates, several congressmen emphasized that section 8 of the Act followed the principle of state control established under the "severance" and "equal footing" doctrines. Congressman Mondell of Wyoming, for example, who led the House debate, stated:

> "Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws.
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> * * * * *

"Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard. . . .

"Now, as to State control over appropriation and distribution of water, I will say to the gentleman that there is no reasonable ground for disagreement on that point. We began to legislate in regard to the use of water in irrigation in 1866. We have legislated continuously along one line." 35 Cong. Rec. 6676, 6679.

This Court, commenting on the congressional debates, recently stated:

"Once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law. As explained by Senator Clark of Wyoming, one of the principal supporters of the reclamation bill in the Senate, 'the control of the water after leaving the reservoirs shall be vested in the States and Territories through which such waters flow.' " *California v. United States, supra* at 667.[15]

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15. Congressman Sutherland, later a member of this Court, stated during the House debate:

"But it is said, further, that the laws of the State or Territory relating to the control, appropriation, and use of the water are not to be interfered with, and this will result in still further confusion. The confusion is in the mind of the objector and not in the bill. No more confusion will result from the use of these waters under the local laws and regulations of the State than have resulted by the use of other waters or property.

* * * * *

"The fact that the title to a lake is in the public, the title and ownership and control of the canals leading from it is in the proprietors of the water, and that the appropriation and use of the water is under the State law has never resulted in any sort of confusion. On the contrary, if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail. The full domination and complete ownership of a tract of land is in no manner injuriously affected, because its title must be acquired and disposed of and it must be occupied and held under and in accordance with the law of the State." *Id.* at 6770.

Significantly, no suggestion was made during the congressional debates that the states' authority under section 8 was limited by the Corps' authority under the Rivers and Harbors Act of 1899. Indeed, no member of Congress even referred to the Corps' authority under the 1899 Act.

Thus, Congress has provided for broad state control of reclamation in the West, whether the reclamation is carried out by the federal government or by private enterprise. Congress provided for state control of private reclamation efforts by the 1891 and 1897 acts, which in turn reaffirmed the principle of state control established under the "severance" and "equal footing" doctrines. Congress extended this principle to federal reclamation efforts by the 1902 Act. Congress has thus consistently, and unequivocally, deferred to state laws on the subject of reclamation. Since a primary purpose of state reclamation laws is to develop the West's arid lands for economic and other purposes, Congress has thus placed itself on the side of the economic growth and development of the West.

This Court has clearly indicated that the reclamation of western lands is to be carried forth under state law. In *Kansas v. Colorado,* 206 U.S. 47 (1907), this Court stated:

> "As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. *We do not mean that its legislation can override state laws in respect to the general subject of reclamation.* . . . [E]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Id.* at 92, 93. (Emphasis added.) See also *California v. United States, supra* at 663.

The historic congressional policy of providing for state control of reclamation is not consistent with the notion that the Corps

has authority to override all state reclamation schemes that affect "navigable capacity," as that term is used in the 1899 Act. As noted earlier, virtually every state reclamation effort affects "navigable capacity" in the sense that it may affect *hypothetical* commerce. See pp. 15-16, *supra*. Therefore, if the Act applies in this context, the Corps would have veto power over virtually every reclamation scheme undertaken by the western states. Concomitantly, the Corps would have broad supervisory control of the water rights systems of the western states. It would control the distribution of water to cities, farms, industries, powerplants, and other entities that receive their water supply under authority of state water rights laws. In short, the Corps would have unimagined influence over the economic growth and environmental quality of the West. This result goes far beyond that contemplated by Congress in enacting the 1899 Act.

Moreover, if the Corps has authority to veto state water allocations under the 1899 Act, it could effectively curtail state reclamation schemes that have been in existence for many years. In this case, for example, the SWP has exported waters from the Delta since 1967, and the CVP has exported such waters since 1951. Pet. Supp. App. 8. Under the lower decision, the Corps would have the power to halt further water deliveries by these projects, even though water users in central and southern California have relied on these deliveries for many decades. The Corps would thus have the power to overturn a massive water delivery system that has been a major cause of California's modern growth, and thus turn the economic clock back to an earlier age. Nothing in the 1899 Act indicates that such broad authority was to be vested in the Corps.

4. Miscellaneous Federal Laws.

In the twentieth century, Congress has enacted many other laws reaffirming the right of the western states to allocate water

among competing interests.[16] For instance, the Flood Control Act of 1944, 58 Stat. 887, which authorizes the Corps to build projects for navigation and flood control purposes, expressly provides that such projects cannot interfere with the states' primary authority to control the allocation of their waters. The Act states:

> "[I]t is hereby declared to be the *policy of Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control* as herein authorized to preserve and protect to the

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16. See, *e.g.*, Act of June 4, 1897, § 1, 30 Stat. 36, 16 U.S.C. § 481 (authorizing use of federal lands for forest purposes); Act of February 1, 1905, § 4, 33 Stat. 623, 18 U.S.C. § 524 (granting rights-of-way for the construction of dams and reservoirs); Warren Act of February 21, 1911, § 2, 36 Stat. 928, 43 U.S.C. § 524 (authorizing sale of surplus reclamation water); Federal Power Act of June 10, 1920, §§ 9(b) and 27, 41 Stat. 1068, 1077, 16 U.S.C. §§ 302(b), 821; Boulder Canyon Project Act, § 18, 45 Stat. 1063 (1928), 43 U.S.C. § 617q; Taylor Grazing Act, 43 Stat. 1270 (1934), as amended, 43 U.S.C. § 315b; Water Conservation Act, 53 Stat. 1419 (1939), as amended, 16 U.S.C. § 590z-1(b)(2); Boulder Canyon Project Adjustment Act, 54 Stat. 779 (1940), 43 U.S.C. § 618; National Parks Act, 60 Stat. 885 (1946), 16 U.S.C. § 17j-2 (1952); Submerged Lands Act, § 3(e), 87 Stat. 30 (1933), 43 U.S.C. § 1311(e); Act of July 28, 1954, § 3(c), 68 Stat. 577 (Santa Margarita Project in California); Act of August 4, 1954, § 4(4), 68 Stat. 667 (protection of watersheds from floods); Act of July 23, 1955, § 4(b), 69 Stat. 368, 30 U.S.C. § 612(b) (providing for multiple use of the surface of tracts of public lands); Colorado River Storage Project Act, § 7, 70 Stat. 109, 43 U.S.C. § 620; Reclamation Project Act of 1939, § 4, 70 Stat. 483, 43 U.S.C. § 485h-4; Small Reclamation Projects Act of 1956, § 4(b), 70 Stat. 1044, 43 U.S.C. § 422d(b); Act of July 22, 1965, 79 Stat. 244, 42 U.S.C. § 1962 (providing for optimum development of nation's water and related land resources); Act of September 2, 1965, § 4, 79 Stat. 618, 43 U.S.C. § 616ddd (Auburn-Folsom South Project in California); Act of December 31, 1970, § 111, 84 Stat. 1821, 33 U.S.C. § 595a (authorizing construction, repair and preservation of certain public works on rivers and harbors for navigation, flood control, and other purposes).

Also, the Mexican Water Treaty, which allocates waters between the United States and Mexico, provides that the treaty shall not be construed as authorizing federal officials to "directly or indirectly alter or control the distribution of water to users" within the United States. Mexican Water Treaty, Reservation (c), U.S. Treaty, ser. no. 994, 39 Stat. 1265 (1945).

fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers. . . .

* * * * *

"The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes." 58 Stat. at 888, 889. (Emphasis added.)

Similarly, the Federal Water Supply Act of 1958, 43 U.S.C. § 390(b), reaffirms the congressional policy of deferring to state water allocation laws. The Act provides:

"It is declared to be the policy of the Congress to recognize the *primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes* and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects." 43 U.S.C. § 390(b). (Emphasis added.)

An eloquent expression of the historic congressional policy is found in the legislative history supporting the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the federal government to the jurisdiction of state courts for general stream adjudication purposes. According to this legislative history:

"In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, *which State is vested with the primary control thereof.*

* * * * *

"Since it is clear that the *States have the control of water within their boundaries,* it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951). (Emphasis added.) See *California v. United States,* 438 U.S. 645, 678-679 (1978).

Indeed, the subsequent history of the Rivers and Harbors Act of 1899 provides a clear example of how Congress has deferred to state water allocation laws even with respect to the Corps' powers under that Act. Section 13 of the 1899 Act, in its original form, authorized the Corps to control waste discharges into navigable waters. 33 U.S.C. § 407; *United States v. Republic Steel Corp.,* 362 U.S. 482 (1960). In 1972, the Corps' powers under section 13 were transferred to the Administrator of the Environmental Protection Agency when Congress amended the Clean Water Act, 33 U.S.C. §§ 1251-1376. See 33 U.S.C. § 1342(a) (5). The 1972 amendments to the Clean Water Act, however, expressly provide that the Administrator's authority to control waste discharges shall not be construed to interfere with "the authority of each State to allocate quantities of water within its jurisdiction . . . ." *Id.* at § 1251(g). See *id.* at § 1370(2).[17] In short, Congress transferred part of the Corps' authority under the Rivers and Harbors Act of 1899 to the Administrator, but made clear that the Administrator's authority is subordinate to state water

17. Section 101(g) of the Clean Water Act provides:
"It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. § 1251(g).

Section 410 of the same Act provides:
"Except as expressly provided in this Act, nothing in the Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* at § 1370(2).

allocations. The clear implication is that the authority retained by the Corps under the 1899 Act is also subordinate to state water allocations.

C. THE COURT SHOULD CONCLUDE EITHER THAT (1) THE RIVERS AND HARBORS ACT OF 1899 IS NOT APPLICABLE TO WATER ALLOCATIONS ADOPTED UNDER STATE WATER RIGHTS LAWS OR (2) THE ACT, IF APPLICABLE, APPLIES ONLY WHERE IMPORTANT FEDERAL NAVIGATION INTERESTS ARE SUBSTANTIALLY IMPAIRED.

We have seen, to this point, that Congress has established an historic policy of deferring to state water rights laws, a policy which has been instrumental in western economic development. Congress has also established a policy, in the Rivers and Harbors Act of 1899, of preventing obstructions to navigation. These congressional policies, as we have seen, are in conflict if the 1899 Act is construed as authorizing the Corps to control state water allocation schemes established under state water rights laws. This conflict is exacerbated rather than reconciled by the lower decision. That decision, in holding that the Corps can control state water allocations, achieves the congressional policy of preventing obstructions in navigable waters. It achieves this end, however, at the expense of the congressional policy of deferring to state water rights laws. Moreover, the decision holds that the Corps can control state water allocations that, as here, have no substantial effect on actual navigation and are essential to the development of California's semiarid lands. The decision, by literal construction of the 1899 Act, thus serves marginal navigation aims at the expense of important reclamation aims.

This Court has often held that, in resolving potential conflicts between statutes, the statutes should be interpreted, if possible, in a way that harmonizes and accomodates their purposes and meaning. See, *e.g., Cox v. Roth,* 348 U.S. 207, 208-209 (1955); 2A Sutherland, *Statutory Construction* § 53.01, at 342-343. Further, this Court has often developed common law rules

to fill the interstices of a congressional regulatory scheme. See, *e.g., Illinois v. City of Milwaukee,* 406 U.S. 91 (1972). Thus, there is ample precedent for reconciling the potential conflict between the 1899 Act and other federal laws deferring to state water rights laws. In our view, there are two possible ways in which this conflict can be reconciled, which we now set forth as alternative arguments.

1. Inapplicability of 1899 Act to State Water Allocations Adopted Under State Water Rights Laws.

Preferably, the 1899 Act should be construed as not applicable to state water allocations adopted under state water rights laws. As noted earlier, Congress has delegated broad authority to the western states to control the allocation of their waters, and there is no indication in the 1899 Act, or in its legislative history or the historical circumstances that led to its adoption, that Congress meant to abridge this delegation of authority. Under the navigation servitude, Congress can, of course, rescind or modify this delegation of authority by providing that state water allocations cannot impair the navigability of water. See, *e.g., California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 159 (1935); *California v. United States,* 438 U.S. 645, 662 (1978). Therefore, if Congress determines that our suggested approach impairs important federal navigation interests, it can enact legislation to protect those interests. In enacting the 1899 Act, however, Congress did not limit state control of water allocations, and thus apparently perceived that such state control has no significent impact on important federal navigation interests.

Further, other federal remedies are available to protect important federal navigation interests affected by most state water allocations. In *Williamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888), as noted earlier, this Court held that, although the federal common law does not generally bar obstructions to navigable waters, the federal common law bars obstructions to navigable

waters that impair the rights and interests of other states in such waters. 125 U.S. at 15-17. Accord, *New Jersey v. New York*, 283 U.S. 336,342-343 (1931); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852).[18] Therefore, although the federal common law does not apply to intrastate waters, it does apply to interstate waters. If a state obstructs interstate waters in the process of reclaiming its arid lands, the federal common law provides a remedy to prevent the obstruction.

This conclusion is particularly significant here because federal navigation interests are primarily linked to interstate waters, not intrastate waters. The federal power to control navigation derives from the federal power to regulate interstate commerce, which in turn is primarily affected by interstate rather than intrastate waters. See, *e.g., Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1886); *In re Debs*, 158 U.S. 564, 586 (1895).[19] Indeed, it is questionable whether the 1899 Act even applies to waters that do not flow between states.[20] In any event, federal navigation

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18. The *Williamette Bridge* decision also held that the federal common law prohibits a state from discriminatorily regulating access to navigable waters, and from imposing duties on such access. 125 U.S. at 10. Accord, *Cardwell v. American Bridge Co.*, 113 U.S. 205, 212 (1885).

19. As this Court stated in *Gilman v. Philadelphia, supra*:

> "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States *which are accessible from a State other than those in which they lie.*" 70 U.S. at 724. (Emphasis added.)

20. The District of Columbia Circuit recently ruled that the 1899 Act is applicable only to navigable waters that form part of a "continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." See *National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1059, 1060-1061 (D.C.Cir. 1980). Under the decision, the Act is thus inapplicable to intrastate waters.

In this case, although the waters of the Delta and its tributary rivers are wholly located in California, these waters are apparently part of a continuous link with the waters of the Pacific Ocean. In this sense, the Delta is apparently part of an interstate network of waters. Under our analysis, the United States, as well as other states, may thus have the right to bring a common law action against the State of California, claiming that California's diversions are causing navigation obstructions that interfere with commerce among the states.

interests are primarily tied to interstate waters, and the federal common law already affords a remedy to prevent navigation obstructions in such waters. Therefore, federal navigation interests, at least to the extent affected by interstate waters, are fully protected even though no similar remedy is found in the 1899 Act.

2. Inapplicability of 1899 Act Except Where Federal Navigation Interests Are Substantially Impaired.

Alternatively, if the Court rules that the 1899 Act is applicable to state water allocations adopted under state water rights laws, it should accomodate and harmonize the Act's purposes with the historic congressional policy of deferring to state water allocations. These purposes and policies can be accommodated if the 1899 Act is construed as applicable only to state water allocations that substantially impair actual navigation, or otherwise render the waters unusable for commerce. Under this approach, the states cannot, in the process of reclaiming their arid lands, substantially interfere with actual commerce or destroy potential commerce without obtaining congressional authorization. As explained earlier, the water diversions in this case do not have this effect. Therefore, the diversions are not violative of the 1899 Act.

Our suggested approach accommodates the purposes of Congress' laws on the subjects of navigation and reclamation, because it protects the most important objectives of each. On the one hand, this approach prevents the states from imposing significant burdens on navigation, and thus from significantly limiting commerce. It thus protects the important federal navigation interests that underlie the 1899 Act. On the other hand, this approach enables the states to allocate water in a way that does not impair important federal navigation interests, and thus provides that the states are otherwise free to pursue reclamation efforts that are vital to the efficient use of the West's sparse water supply. This approach thus protects the states' reclamation interests without impairing important federal navigation interests.

It ensures that the major aims underlying one interest will not be ignored in favor of minor aims underlying the other.

This approach, in accommodating congressional policies relating to navigation and reclamation, is consistent with the approach which this Court has taken in other cases involving the delicate interrelationship of federal and state powers. This Court has often balanced federal and state interests in cases involving issues of federalism, whether the issues involve constitutional or statutory interpretation.[21] This balancing approach, for example, underlies the preemption doctrine. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *New York State Dept. of So-*

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21. In the field of labor law, for example, the Court has determined that, although federal law controls the interpretation of collective bargaining contracts, "state law, if compatible with the purpose of" federal law, "may be resorted to in order to find the rule that will best effectuate the federal policy." See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957).

In the field of antitrust law, the Court has held that the applicability of the federal antitrust laws to the states, and to private individuals acting under a state regulatory scheme, depends on the nature of the state interest and the availability of alternative means by which that interest can be achieved. See *Parker v. Brown*, 317 U.S. 341 (1943); *Cantor v. Detroit Edison*, 428 U.S. 579, 595-598 (1976).

In the field of Indian law, the Court recently held that the applicability of state law to on-reservation Indian activities depends on "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." See *Washington et al. v. Confederated Tribes*, 100 S.Ct. 2069, 2083 (1980).

In balancing the imperatives of the Tenth Amendment against Congress' constitutional powers over commerce, the Court has held that the states are subject to congressional laws adopted under the commerce power except where such laws infringe on activities that are within the traditional and inherent province of the states. See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

In interpreting the states' sovereign immunity under the Eleventh Amendment, the Court has held that the states may waive their sovereign immunity under the Eleventh Amendment if they engage in activity regulated by Congress under its commerce powers, but that the states are not deemed to thus waive their immunity unless Congress so indicates " 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1975). See also *Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973).

cial Services v. Dublino, 413 U.S. 405 (1973).[22] This approach has been particularly followed in determining the responsibility of federal and state agencies for control of the West's water resources. See, *e.g., United States v. New Mexico,* 438 U.S. 646 (1978); *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935).

Indeed, this balancing approach was taken in one of the leading cases that govern this controversy. In *California v. United States,* 438 U.S. 645 (1978), as noted earlier, this Court held that section 8 of the Reclamation Act of 1902 provides for state control of federal water uses except where this result is inconsistent with "clear congressional directives." Section 8, on its face, contains no limitation relating to congressional directives. Nonetheless, the Court, acting on California's suggestion, did not literally interpret section 8. Instead, it interpreted section 8 in light of the vast array of laws and policies which Congress has adopted in the field of reclamation. The Court thus harmonized the principle of state control, as provided in section 8, with substantive reclamation policies established by Congress in other legislation. We urge the same approach here. That is, section 10 of the 1899 Act, which prohibits obstructions to navigation, should not be read literally in the context of state water allocations. In this context, the section should be read in light of the broad congressional laws and policies applicable in the fields of navigation and reclamation, particularly the laws and policies deferring to state water allocations. This approach is the essence of federalism, for it balances and accommodates both national and local goals relating to control of water resources in the West.

Our suggested approach is consistent with this Court's only decision in which the 1899 Act has been arguably considered in

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22. Under the preemption doctrine, congressional laws are not deemed to have a preemptive effect except where such is the "clear and manifest purpose" of Congress. *Rice v. Santa Fe Elevator Corp., supra* at 230. One commentator has noted that this Court, in applying the preemption doctrine, now appears to have a "flexible conception of federal-state relations rather than one of absolute federal supremacy." See Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," 75 *Colum. L. Rev.* 623, 641 (1975).

the context of state water rights laws. In *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1889), an irrigation district attempted to build a dam for irrigation purposes on a non-navigable tributary of the Rio Grande River, which is a navigable river flowing through several states. Although the district "had complied with all the laws of that Territory [New Mexico] in reference to the construction of reservoirs and dams and the diversion of waters of public streams," 174 U.S. at 692-693, there is no indication that the dam had been approved by the territory in the kind of administrative or judicial proceeding which is the pivotal feature of modern state appropriation laws. It is thus unlikely that the State had the kind of interest in that case which the states now have under their appropriation laws, and which California has here. In any event, the United States brought an action to enjoin construction of the dam. This Court granted injunctive relief on grounds, repeated at several places in the opinion, that the dam threatened to "destroy" the navigability of the Rio Grande River. *Id.* at 706, 708. The Court held that Congress, in passing the Desert Land Act of 1877 and other legislation delegating authority to the western states to control their unappropriated waters, did not mean to authorize the states to "destroy" the navigability of navigable waters.[23] The Court

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23. The Court, referring to the Mining Act of 1866 and the Desert Land Act of 1877, stated:

> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to *destroy* their navigability, is to carry those statutes beyond what their fair import permits. . . . To hold that Congress, by these acts, meant to confer upon any State the right to appropriate *all* the waters of the tributary streams which unite into a navigable watercourse, and so *destroy* the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated." 174 U.S. at 706. (Emphasis added.)

also held that the Rivers and Harbors Act of 1890, which is the antecedent of the 1899 Act, was intended to ensure that the states would not be able to "destroy" the navigability of such waters.[24] Since the Court ruled that Congress had not delegated authority to states to destroy navigability, its comments on the effect of the 1890 Act appear to be dictum. In any event, the Court made clear that the states cannot "destroy" navigability in the process of reclaiming their arid lands. The decision is thus fully consistent with our alternative argument that the states cannot destroy potential commerce, or substantially impair actual commerce. The decision thus suggests, as we urge, that the Court should accomodate congressional laws and policies on the subjects of navigation and reclamation.

Finally, our suggested approach is consistent with this Court's decisions interpreting the 1899 Act. In *Wisconsin v. Illinois*, 278 U.S. 367 (1929), this Court declared: "The true intent of the Act of Congress [Rivers and Harbors Act of 1899] was that *unreasonable* obstructions to navigation and navigable capacity were to be prohibited. . . ." 278 U.S. at 413. (Emphasis added.) The Court thus made clear that the 1899 Act, even in contexts unrelated to state water allocations, applies only where there is an "unreasonable" effect on federal navigation interests. *A fortiori*, the Act applies only to state water allocations that *substantially* impair commerce.[25]

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24. The Court, referring to 1890 Act, stated:
"Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to *destroy* the navigability without the explicit assent of the National Government, enacted the statute in question." *Id.* at 708 (Emphasis added.)

25. In *Wisconsin v. Illinois, supra*, as well as the related case of *Sanitary District v. United States*, 266 U.S. 405 (1925), the Court dealt with the effect of the 1899 Act upon diversions by the State of Illinois for sewage disposal purposes. In *Sanitary District*, the Court held that the

3. Traditional Roles of States and Army Corps of Engineers.

Our alternative arguments are consistent with the historic roles which have been assumed by the western states and the Corps in the fields of reclamation and navigation. In response to the congressional policy of deferring to state water rights laws, the western states, as noted earlier, have developed elaborate administrative and judicial machinery to administer these laws. The machinery developed by the State of California is illustrative. In California, the State Water Resources Control Board ("State Board") conducts noticed hearings in response to water rights applications, and competing water users and others are authorized to testify and present evidence at the hearings. Cal. Wat. Code §§ 1340, 1350; 23 Cal. Admin. Code § 733(h). After the hearing, the State Board either grants or denies the application; if it grants the application, it can affix conditions on the water right to ensure the reasonable and beneficial use of water and to protect the public interest. Cal. Wat. Code §§ 1255-1257, 1390, 1391. The State Board's decision is subject to judicial review. *Id.* at § 1360. The State Board's decision typically results in an allocation of water, in that it determines the applicant's right to appropriate water

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diversions—which had not been approved by the Secretary of the Army—were in violation of section 10 of the 1899 Act, and in *Wisconsin* the Court held that—as the diversions had been subsequently approved by the Secretary—the diversions were *not* in violation of section 10. Neither case involved the allocation of water under state water rights laws, and thus neither case is fully opposite here.

Moreover, both cases involved substantial effects on actual navigation, unlike the instant case. In both cases, the State of Illinois diverted water from a tributary of Lake Michigan, thus causing *substantial* reductions in lake levels that obstructed *actual* commerce. See 266 U.S. at 423; 278 U.S. at 400, 408-409.

Finally, in both cases, the rights of other states bordering on Lake Michigan were adversely affected by the diversions. *Id.* As noted earlier, the federal common law prohibits a state from interfering with the rights of other states in interstate waters. See, *e.g., Williamette Iron Bridge Co. v. Hatch,* 125 U.S. 1, 15-17 (1888). Therefore, the results in both cases could have been sustained under common law rules. Indeed, the *Rio Grande* decision might have also been sustained under common law rules, since the Rio Grande River is an interstate river.

that otherwise would be available for competing uses. In this case, for example, the State Board issued a landmark administrative decision, Decision 1485, that authorizes the diversion of water from the Delta under several enumerated conditions, many of which are intended to protect the Delta's environment and water quality. See p. 6, *supra*. The decision thus results in a major allocation of water among economic, domestic, and environmental interests in northern, central, and southern California.

Thus, California and other western states, under their water rights laws, have historically exercised the function of distributing and allocating water among competing users and uses. They have traditionally controlled the reclamation of their arid lands. They have developed administrative and judicial machinery to carry out this function. They have developed abundant expertise on the subject of water allocations and reclamation.

Conversely, the Corps has not traditionally controlled water allocations or reclamation. It has no significant, demonstrable expertise in this area. The Corps' historic role has been confined to navigation. In view of the Corps' historically limited role, it is not likely that Congress meant for the Corps to act as the final arbiter on the subject of water allocation and reclamation in the West. Congress surely did not mean for the Corps to exercise supreme authority in an area that has been under traditional state jurisdiction and control.

Indeed, the very breadth of the Corps' authority under the 1899 Act militates against the view that the Act was intended to encumber state water allocation schemes. The broader the Corps' authority under the Act, the greater the potential conflict between the Corps' authority and the congressionally-delegated authority of the states. This Court has held on several occasions that the Corps' authority under the Act is very "broad." See *United States v. Republic Steel Corp.*, 362 U.S. 482, 487, 488, 489 (1960); *Wyandotte v. United States*, 389 U.S. 191, 201 (1967). The

Corps' jurisdiction under the Act, as noted earlier, extends to structures that affect hypothetical navigation, not just actual navigation. See p. 16, *supra*. Further, lower courts have held that the Act, in conjunction with recent federal environmental laws, authorizes the Corps to deny permits on environmental rather than navigation grounds. See *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970); see n. 34, *infra*. Following this approach, the Corps has adopted regulations that authorize it to deny permits whenever it believes that the "public interest" is not served by the diversions; factors related to the "public interest" under the regulations include "conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood-damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4 (a), 40 Fed. Reg. 31326-31327 (1975).

If, as the Corps' regulations provide, the Corps has authority to consider factors such as "conservation," "aesthetics," "general environmental concerns," "historic values," "food production," and related factors, it has authority to consider the same factors that the western states typically evaluate in considering water rights applications. Under this hypothesis, Congress would have effectively delegated authority to the western states and the Corps over the same subject matter. The Corps would have authority to override a state water allocation scheme by rejecting the state's evaluation of the very policy factors that underlie the scheme. If the Corps has this authority, it would effectively supplant the western states as the dominant jurisdictional body that is ultimately responsible for determining allocation of the West's water resources among competing economic, agricultural, domestic, and other interests. It would exercise a breadth of control over the economy and environment of the West far beyond that ever contemplated by Congress. Thus, the very breadth of the Corps'

authority under the 1899 Act in other contexts indicates that, in the context of state water allocations, the Act does not apply.

Importantly, we do not oppose the view that the Corps has broad authority under the Act where state water allocations are *not* involved. In this context, the Corps is usually regulating an area that is not otherwise subject to congressional regulation. The Corps' authority should be interpreted broadly in these areas, to serve the purposes of the 1899 Act in filling the federal regulatory void caused by the absence of a federal common law. On the subject of water allocations in the West, however, there is no such void. Congress has delegated broad authority to the western states over this subject matter. To broadly construe the Corps' authority in this area would thus invite a substantial conflict between congressional policies on the subjects of navigation and reclamation. It would authorize the Corps to exercise a function which has been traditionally exercised by the states, and not by the Corps.[26]

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26. If the Corps has authority to approve or disapprove a water allocation scheme adopted under state water rights laws, it would be required under other federal laws to prepare and issue an environmental impact statement (EIS) before approving such a scheme, if the Corps' approval constitutes a "major" federal action "significantly affecting the quality of the human environment." See National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, 4332(C). It is doubtful if Congress ever intended that water allocations established under state water rights laws would be subject to the EIS requirements provided under NEPA. Such, however, is the result of the Court of Appeals' decision.

This is not to suggest that the western states, in allocating water under their water rights laws, are or should be oblivious to environmental concerns. Indeed, California has adopted its own environmental laws applicable to such allocations, which requires the preparation and issuance of an environmental impact report prior to major state actions that significantly affect environmental quality. See California Environmental Quality Act (CEQA), Cal. Public Resources Code §§ 21000-21174. The State Board prepared and issued an environmental impact report under CEQA in conjunction with its issuance of Decision 1485, and this report fully considered environmental values both within and without the Delta. See n. 3, *supra*.

For the foregoing reasons, we conclude that the 1899 Act is not applicable to state water allocations adopted under state water rights laws or, in the alternative, is applicable only to state water allocations that destroy navigability or substantially impair actual navigation. The allocation of water among statewide interests provided by the State Board does not have any substantial effect on actual navigation in the Delta, or otherwise render the Delta's waters unusable for commerce. Therefore, the allocations are not violative of the 1899 Act.

II. THE RIVERS AND HARBORS ACT OF 1899 DOES NOT APPLY FULLY, IF AT ALL, TO DIVERSION WORKS OWNED AND OPERATED BY THE STATES.

We have argued that the 1899 Act does not apply to water diversions authorized under state water rights laws, at least where substantial federal navigational interests are not affected. We now argue, independently of that ground, that the Act is not applicable to water diversions from reclamation projects that are owned and operated by the states, at least to the same extent that the Act is applicable to other projects and activities.

Under section 12 of the 1899 Act, any "person" or "corporation" who violates the Act is subject to penal sanctions or injunctive relief. 33 U.S.C. § 406. The Act thus apparently applies only to structures or activities of a "person" or "corporation." This Court has held that a state is not a "person" or "corporation" within the meaning of federal laws unless Congress clearly indicates otherwise. See *Parker v. Brown,* 317 U.S. 341, 351 (1943). As the Court stated in *Parker*:

> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351.

In *Parker,* the Court held that the federal antitrust laws, which apply only to a "person" or "corporation," see 15 U.S.C. §§ 1, 2, 4, 7, do not apply to the states. *Id.* In our view, the same result follows under the Rivers and Harbors Act of 1899, which also applies only to a "person" or "corporation."

Moreover, nothing in the 1899 Act or its legislative history indicates that Congress meant to inhibit reclamation activities undertaken by the states themselves. As noted earlier, the legislative history indicates that Congress was concerned only with bridges or other structures built by private entities, such as a "railroad company" or other "corporation." See n. 9, *supra.* Accordingly, the 1899 Act is not applicable to reclamation projects owned and operated by the states.

At the minimum, the 1899 Act should not be applied to state projects to the same extent that the Act applies to private projects. This Court has often held that federal laws are not always applicable to states on the same terms as to private entities, and has balanced federal and state interests in determining whether such federal laws are applicable to the states. In *Cantor v. Detroit Edison,* 428 U.S. 579, 595-598 (1976), this Court, refining its earlier decision in *Parker v. Brown, supra,* followed such an approach in determining whether the federal antitrust laws are applicable to the states.[27] A similar approach has been followed in determining whether a state imposes an unconstitutional burden on interstate commerce. See, *e.g., Dean Milk Co. v. Madison,* 340 U.S. 349 (1951); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 152-156 (1963). The same approach should be followed here, if it is determined that the 1899 Act applies to state projects. That is, assuming that the state project serves important public

27. In *Cantor,* the Court held that (1) the federal antitrust laws are not applicable to the states at all, and (2) the applicability of such laws to private entities acting under a state regulatory scheme depends on the nature of the state interest and the availability of alternative means by which the state interest can be achieved. 428 U.S. at 595-598.

needs, the Act should apply only if the project has a significant impact on federal navigation interests, in that it substantially impairs actual navigation or otherwise renders the waters unusable for commerce. Thus, under principles of federalism formulated elsewhere, the Court should harmonize federal laws relating to navigation and reclamation.[28]

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28. The United States noted, in its reply to our petition for writ of certiorari, that the reference to a "person" or "corporation" in section 12 appears in the first sentence, which relates to penal sanctions; this reference, it is noted, does not appear in the second sentence, which provides for injunctive relief. Brief for the Federal Respondents ("U.S. Br."), 15 n. 11. The implication, the United States argues, is that states are subject to injunctive relief but not penal sanctions. *Id.* The more likely implication, we believe, is that injunctive relief was meant to be complementary to penal sanctions, and thus that injunctive relief can be applied only to entities that are otherwise subject to penal sanctions. In any event, in light of the principles of federalism articulated in *Parker* and other cases cited above, the language of section 12 is sufficiently unclear to warrant the conclusion that the states are subject to the same constraints that apply to others.

Indeed, the United States' argument would support the conclusion that the states are subject to injunctive relief but not penal sanctions under the federal antitrust laws. The federal antitrust laws provide, similarly to the Rivers and Harbors Act of 1899, for penal sanctions against a "person" or "corporation," but make no similar reference with respect to injunctive remedies. See 15 U.S.C. §§ 1, 2, 4, 7. This Court ruled in *Parker* that the states are not subject either to penal sanctions or injunctive relief under the federal antitrust laws, thus rejecting any distinction between those two kinds of remedies.

The United States also argues that the United States' enforcement powers are not limited to those provided in the 1899 Act, citing this Court's decision in *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 202-203 (1967), and *United States v. Republic Steel Corp.,* 362 U.S. 482, 491-492 (1960). U.S. Br. 15 n. 11. In those cases, however, it was clear that Congress had meant to regulate a particular activity under the 1899 Act, but had failed to provide the necessary enforcement remedy. This Court ruled that, under these circumstances, the U.S. Attorney General has inherent enforcement powers. These cases do not suggest, however, that the Attorney General has inherent enforcement powers with respect to activity that Congress did *not* mean to regulate under the 1899 Act. The Attorney General cannot, under his inherent enforcement powers, restrain conduct that is beyond the scope of the Act. Indeed, under the Attorney General's view of his inherent enforcement powers, he would have the power to enforce the federal antitrust laws against the states, notwithstanding this Court's decisions in the *Parker* and *Detroit Edison* cases.

III. THE RIVERS AND HARBORS ACT OF 1899 IS NOT APPLICABLE TO WATER ALLOCATIONS FROM FEDERAL RECLAMATION PROJECTS BUILT AND OPERATED UNDER THE RECLAMATION ACT OF 1902.

Both the State of California and the United States argued below that the 1899 Act is not applicable to water diversions from reclamation projects built and operated by the federal government under the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. §§ 371 *et seq.*[29] Our views have been set forth earlier in this brief in another context. See pp. 28-31, *supra.* We argued that Congress has delegated broad authority to the states to control water allocations, as evidenced *inter alia* by the states' authority to control water allocations from federal projects, and hence the states have the right to control allocations from their *own* reclamation projects. We now briefly repeat our views in the context of arguing that the states have the express right to directly control water allocations from *federal* reclamation projects, and thus that such allocations are not subject to the Corps' authority under the 1899 Act. Therefore, the Act does not apply to water exports from the federal CVP to water districts which have contracted for delivery of the water.

As noted earlier, Congress, in enacting the Reclamation Act of 1902, undertook to reclaim the West's arid lands by developing a water supply for local agricultural and other needs. Sections 2 and 10 of the Act provide that the projects are to be operated by the U.S. Water and Power Resources Service (WPRS). 43 U.S.C. §§ 411, 373. Section 8, as noted earlier, provides that state law controls the appropriation and distribution of project water except to the extent inconsistent with "clear congressional directives." *Id.* at §§ 372, 383; *California v. United States,* 438 U.S. 645

29. The State of California has an interest in whether the Corps is authorized to control water diversions from federal reclamation projects because (1) under section 8 of the Reclamation Act of 1902, the states are authorized to control such diversions, and (2) such projects provide economic and other benefiits to the state in which the projects are located.

(1978). Thus, Congress provided a comprehensive regulatory scheme that divides regulatory authority between the WPRS and the states, a division of authority that was clarified by this Court in *California v. United States, supra.* Nothing in the 1902 Act or its legislative history, as discussed earlier, indicates that Congress meant for the Corps to share in this division of authority. See pp. 28-31, *supra.* Indeed, nothing in the 1902 Act or its legislative history even makes reference to the 1899 Act, or the Corps' powers thereunder. *Id.* It is thus clear that Congress meant for the states and the WPRS to exercise exclusive regulatory control over the federal reclamation program. This result is inconsistent with the notion that the Corps has authority to control federal water diversions under this program.[30]

IV. SECTIONS 9 AND 10 OF THE RIVERS AND HARBORS ACT OF 1899 ARE NOT APPLICABLE TO STRUCTURES OR ACTIVITIES THAT DO NOT OBSTRUCT NAVIGABLE CAPACITY.

The Court of Appeals held that sections 9 and 10 of the 1899 Act authorize the Corps to prohibit structures that have no effect on navigable capacity. Pet. App. 24-27; see n. 7, *supra.* In our view, the sections do not apply to such structures, regardless of the merits of our other arguments. We have deferred our dis-

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30. The Court of Appeals stated that the Reclamation Act of 1902 is inapplicable here because that Act applies in "the context of reclamation," Pet. App. 37, thus overlooking the fact that the water diversions in this case are part of a *reclamation* scheme adopted for both federal and state projects.

The Court of Appeals, relying on this Court's decisions in *City of Fresno v. California,* 372 U.S. 627 (1963), and *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958), stated that section 8 of the Reclamation Act of 1902 is primarily intended to allow state law to define the value of water rights for which compensation must be paid when the water rights are seized for reclamation purposes. Pet. App. 35. The Court misread the impact of this Court's recent decision in *California v. United States, supra,* where this Court, reversing parts of its earlier decisions in *City of Fresno* and *Ivanhoe,* ruled that section 8 provides the states with broad control of federal water allocations and uses under the 1902 Act. See 438 U.S. at 670-674.

cussion of this matter because it is not material to the outcome of this case. Our argument is that sections 9 and 10 do not apply fully, if at all, to water diversions authorized under state water rights laws, particularly where the water is diverted by a project owned and operated by the state. We concede, however, that the diversions in this case have an effect, however insubstantial, on "navigable capacity" of the Delta. Therefore, if sections 9 and 10 fully apply to water diversions authorized under state water rights laws, we concede that the sections apply here. The Court of Appeals' conclusion, to the effect that the sections apply even where navigable capacity is unaffected, is thus dictum. This dictum may have a broad impact upon western water law in other contexts, however. The dictum is also contrary to the plain meaning and statutory history of sections 9 and 10. For these reasons, we now analyze this dictum more closely even though it will not affect the outcome of this case.

A. STATUTORY ANALYSIS OF SECTIONS 9 AND 10.

As noted earlier, the first clause of section 10 prohibits any "obstruction" to "navigable capacity" in the absence of congressional authorization. 33 U.S.C. § 403. The second and third clauses of section 10, as well as section 9, provide methods for legitimizing such obstructions without the necessity of obtaining congressional approval. Section 9, which applies to structures such as bridges and dams, effectively requires approval both by the Corps and the legislature of the affected state. The second clause of section 10, which applies to structures such as wharves and piers, requires approval only by the Corps. The third clause of section 10, which applies to activities such as excavations and fills, also requires approval only by the Corps. Therefore, the first clause of Section 10 establishes a general prohibition against obstructions to navigable capacity without Congress' consent, and the other provisions qualify the general prohibition by pro-

viding methods for legitimizing such obstructions without Congress' consent. See pp. 14-15, *supra*.

The Court of Appeals, however, ruled that the other provisions, rather than qualifying the general prohibition against obstructions to navigable capacity, impose prohibitions that are in addition to the general prohibition. Pet. App. 24-27. According to the lower court, the second and third clauses are operative even though the general prohibition contained in the first clause of section 10 is not strictly operative. *Id.* The Court held that structures and activities mentioned in the second and third clauses are "presumed" to obstruct navigable capacity within the meaning of the first clause. *Id.* Under its analysis, for example, the third clause, which makes it unlawful to "alter or modify" the "condition" of navigable waters without Corps approval, prohibits any such alteration or modification regardless of whether it strictly affects navigable capacity. *Id.* Under the court's analysis, section 10 thus authorizes the Corps to control structures and activities that have no effect on navigation or navigable capacity.[31]

This Court has never determined, at least in any exhaustive analysis, whether the 1899 Act was intended to apply to obstructions which have no effect on navigable capacity. In *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929), however, this Court upheld the analysis of this issue provided by the Maine Supreme Court in *Maine Water Co. v. Knickerbocker Steam Towage Co.*, 99 Me. 473, 59 Atl. 953 (1905). In the *Knickerbocker Steam Towage* case, the Maine Supreme Court noted that the first clause of section 10 of the 1899 Act originated in section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 454. See 59 Atl. at 956-957. This provision, in its original form, prohibited an "obstruction" to

31. Conversely, the district court in the case below construed the second and third clauses as inoperative unless there has been an "obstruction" of "navigable capacity" within the meaning of the first clause. Pet. Supp. App. 25-27.

"navigable capacity" unless "affirmatively authorized by law". *Id.*[32]

As the Maine Supreme Court noted, it is infeasible to require congressional approval of every structure or activity that might pose an obstacle to the nation's navigable waterways. *Id.* Congress thus provided, in section 7 of the 1890 Act, methods for legitimizing certain such obstacles short of congressional approval. *Id.* The provisions of section 7 have been re-codified in sections 9 and 10 of the 1899 Act. *Id.* Specifically, in the part of section 7 now found in section 9 of the 1899 Act, Congress provided that any "bridge" or "causeway" is lawful if approved *both* by Congress and the Secretary of the Army, although Congress' consent is not necessary if the structure is approved by the legislature of the affected state. 26 Stat. 454 (1890).[33] Second, in the part of section 7 now found in the second clause of section 10 of the 1899 Act, Congress provided that any "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures" is lawful if approved by the Secretary of the Army. *Id.* Third, in the part of section 7 now found in the third clause of section 10 of the 1899 Act, Congress provided that any activity resulting in an alteration or modification of the waters, such as an excavation or fill, is lawful if approved by the Secretary of the Army. *Id.*

Once the 1899 Act is analyzed in terms of the meaning of the 1890 Act, the meaning of sections 9 and 10 is eminently clear. The first clause of section 10—which originated in section 10 of the 1890 Act—generally prohibits any interference with "navigable capacity" without congressional approval. The other clauses of section 10, as well as section 9—which were originally grouped in section 7 of the 1890 Act—provide methods for legitimizing

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32. In the 1899 Act, the phrase "affirmatively authorized by law," as originally contained in section 10, was changed to "affirmatively authorized by Congress" to make clear that an obstruction is not lawful under section 10 simply because it is approved by a state. *Wisconsin v. Illinois, supra* at 412.

33. In enacting the 1899 Act, Congress added a "dam" and "dike" to the category of structures now listed in section 9.

such interferences without the necessity of obtaining congressional approval. Section 9 provides that structures such as bridges and dams, which often have a *major* impact on navigability, are lawful if approved *both* by the state legislature and the Secretary of the Army. The second clause of section 10 provides that structures such as wharves and piers, which often have a lesser impact on navigability, are lawful if approved simply by the Secretary of the Army; the consent of Congress and the state legislature is not necessary to legitimize such structures. Finally, the third clause of section 10 focuses on *non-structural* activities, such as excavations and fills, that also usually have a lesser impact on navigability; it legitimizes such activities if such are approved by the Secretary of the Army. The congressional scheme is thus lucid and logical. It forbids any impairment of navigable capacity without congressional approval except that (1) certain types of *major* structures can be approved jointly by states and federal officials and (2) certain types of lesser structures and activities can be approved simply by federal officials. See *Wisconsin v. Illinois, supra* at 412-413; *United States v. Republic Steel Corp., supra* at 486-487; *Maine Water Co. v. Knickerbocker Steam Towage Co., supra* at 956-957.

It is thus clear, as the Maine Supreme Court ruled in the *Knickerbocker Steam Towage* case, that the second and third clauses of section 10, as well as section 9, are "qualifications" of the general prohibition contained in the first clause of section 10. See 59 Atl. at 957. These qualifications limit the scope of the general prohibition against obstructions to navigable capacity, rather than impose additional prohibitions beyond the scope of the general prohibition. The purpose of the qualifications is to provide a means to obtain administrative relief from the Act's broad constraints without enlisting the aid of Congress, not to impose additional constraints. The qualifications are exceptions to the general rule that navigable waters must be

unobstructed. As exceptions to the general rule, they cannot apply to activity that is beyond the scope of the rule.

Therefore, the qualifications in sections 9 and 10 are not applicable unless there has been an interference with "navigable capacity" within the meaning of the first clause of section 10. If such an interference exists, the Corps has authority to sanction the structure or activity. In the absence of such an interference, the Act simply does not apply, and the Corps has no jurisdiction in the matter. In short, the Corps can *authorize* that which is otherwise prohibited by the Act, but—contrary to the Court of Appeals' decision—cannot *prohibit* that which is otherwise beyond the scope of the Act.

B. CONSTITUTIONAL ANALYSIS OF SECTIONS 9 AND 10.

The above conclusion is supported, and indeed compelled, by this Court's decisions respecting federal and state powers over navigable waters. As noted earlier, this Court has often held that, under the "equal footing" doctrine, the states have broad control of their navigable waters, subject to the paramount federal power to protect navigability of navigable waters. See *e.g., Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 224-229 (1845); *Shively v. Bowlby,* 142 U.S. 1, 49-50 (1894); *United States v. Oregon,* 295 U.S. 1, 14 (1935); *United States v. Texas,* 339 U.S. 716-717 (1950). Certainly the federal power to protect navigability is, by definition, unaffected where a structure or activity has no effect on navigable capacity. Therefore, sections 9 and 10 would be unconstitutional if construed as applicable to structures or activities that have no such effect. It follows that the second and third clauses of section 10, as well as section 9, must be construed as applicable only to structures or activities that obstruct navigable capacity within the meaning of the first clause of section 10. They limit the scope of the general prohibi-

tion against navigation obstructions, rather than impose prohibitions against structures or activities that have no such effect.[34]

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34. The Court of Appeals also ruled that recent federal environmental laws expand the Corps' authority under the Rivers and Harbors Act of 1899 by authorizing the Corps to deny permits thereunder on solely environmental rather than navigational grounds. Pet. App. 16 n. 13, 22. Such authority, the court ruled, was conferred by the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c) (1976), and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970 and Supp. V 1975). Pet. App. 16 n. 13, 22. A similar result was reached by the Fifth Circuit in *Zabel v. Tabb*, 430 F. 2d 199, 213-214 (5th Cir. 1970), *cert. denied* 401 U.S. 910 (1971).

We do not address the question whether these federal environmental laws authorize the Corps to deny a permit on solely environmental grounds, since this case does not involve the denial of a permit. It is clear from the above constitutional analysis, however, that these federal environmental laws cannot constitutionally authorize the Corps to exercise jurisdiction over structures and activities that have no navigational impacts, at least to the extent that the Corps acts contrary to state law. Therefore, whether or not these federal environmental laws authorize the Corps to deny permits on non-navigational grounds, they cannot be construed as authorizing the Corps to exercise permit-issuing authority over state-approved structures and activities that have no navigational impacts. In other words, if a structure has no navigational effect, the builder is not required to seek Corps approval; if the structure has a navigational effect, the builder must seek Corps approval, and the question remains whether the Corps can deny the permit on grounds unrelated to the navigational effect.

CONCLUSION

In keeping with the federal tradition that molded our constitutional order, the Court should interpret the Rivers and Harbors Act of 1899 in a way that accommodates the historic congressional policy of deferring to water allocations based on state water rights laws. This historic policy has been a pivotal feature in the reclamation of the arid western lands, which has been a major cause of the West's economic advancement. Under our suggested accommodation, the 1899 Act either does not apply in this context at all, or alternatively applies only to the extent that the water allocations substantially impair actual commerce or otherwise render the waters unusable for commerce. This policy is not consistent with the notion that the Corps has broad authority to override water allocations adopted under state water rights laws.

As Justice Holmes has commented, the life of the law is not logic but experience. See Holmes, *The Common Law* 1 (1881). Under our nation's historical experience, the control of water allocations in the West has been the responsibility of the states whose economies and environments are most affected, not the Corps. This historical experience is the lamp that illuminates the issues raised here. We urge reversal of the Court of Appeals' decision.

Respectfully submitted,

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